No. 97-795

Supreme Court, U.S.
FILED
JAN 12 1998
CLERK

In The

Supreme Court of the United States

October Term, 1997

THE PINAL CREEK GROUP, consisting of CYPRUS MIAMI MINING CORPORATION, INSPIRATION CONSOLIDATED COPPER COMPANY, and BHP COPPER INC.,

Petitioners,

v.

NEWMONT MINING CORPORATION, OCCIDENTAL PETROLEUM CORPORATION, CANADIANOXY OFFSHORE PRODUCTION COMPANY, and ATLANTIC RICHFIELD COMPANY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE STATES OF ALABAMA, ARIZONA, ARKANSAS, GEORGIA, MISSOURI, OHIO, OKLAHOMA, TENNESSEE, VERMONT, VIRGINIA, WEST VIRGINIA, THE CITIES OF PHOENIX, SCOTTSDALE, TEMPE AND TUCSON, ARIZONA, THE CITY OF CINCINNATI, OHIO, THE CITY OF FRESNO, CALIFORNIA, AND THE CITY OF SEATTLE, WASHINGTON AS AMICI CURIAE IN SUPPORT OF PETITIONERS

RODERICK G. MCDOUGALL
City Attorney
City of Phoenix
PHILIP M. HAGGERTY*
Chief Assistant City Attorney
CRAIG J. REECE
Assistant City Attorney
200 West Washington Street, 13th Floor
Phoenix, Arizona 85003-1611
Telephone: (602) 262-6761
*(*Counsel of Record)*

Other Counsel Listed Inside Front Cover

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

2-1 PP

BILL PRYOR
Attorney General of Alabama
Office of the Attorney General
11 South Union Street
Montgomery, Alabama 36130
(334) 242-7300

GRANT WOODS
Attorney General
State of Arizona
1275 West Washington
Phoenix, Arizona 85007-2926
(602) 542-8302

WINSTON BRYANT
Attorney General
State of Arkansas
323 Center Street,
Suite 200
Little Rock, Arkansas 72201-2610
(501) 682-2007

THURBERT E. BAKER
Attorney General
State of Georgia
40 Capitol Square, S.W.
Atlanta, Georgia 30034-1300
(404) 656-3383

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri
Supreme Court Building
207 West High Street
Jefferson City, Missouri 65101
(573) 751-3321

BETTY D. MONTGOMERY
Attorney General of Ohio
30 East Broad Street
Columbus, Ohio 43215
(614) 466-3376

W.A. DREW EDMONDSON
Attorney General of Oklahoma
2300 North Lincoln Blvd.,
Suite 112
Oklahoma City, Oklahoma 73105
(405) 521-3921

JOHN KNOX WALKUP
Attorney General and Reporter
State of Tennessee
2nd Floor Cordell Hull Building
425 Fifth Avenue North
Nashville, Tennessee 37243-0495
(615) 741-3491

WILLIAM H. SORRELL
Attorney General
Office of the Attorney General
109 State Street
Montpelier, Vermont 05609-1001
(802) 828-3171

Richard Cullen
Attorney General of the Commonwealth of Virginia
800 East Main Street
Richmond, Virginia 23218
(804) 786-2071

Darrell V. McGraw
Attorney General of West Virginia
Office of the Attorney General
Building 1, Room 26-E
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305-0220
(304) 558-2021

Fay D. Dupuis
City Solicitor
W. Peter Heile
Deputy City Solicitor
City of Cincinnati
City Hall, Room 214
801 Plum Street
Cincinnati, Ohio 45202
(513) 352-3334

Hilda Montoy
City Attorney
Martin D. Koczanowicz
Deputy City Attorney
City of Fresno
2600 Fresno Street
Fresno, California 93721-3602
(209) 498-1326

Fredda Bisman
City Attorney
Barbara R. Goldberg
Assistant City Attorney
City of Scottsdale
3939 Civic Center Boulevard
Scottsdale, Arizona 85251
(602) 994-2405

Mark H. Sidran
City Attorney
David Bruce
Assistant City Attorney
City of Seattle
Environmental Protection Section
600 Fourth Avenue, 10th Floor
Seattle, Washington 98104-1877
(206) 233-2164

David Merkel
City Attorney
Karen S. Gaylord
Assistant City Attorney
City of Tempe
140 East Fifth Street, #301
Tempe, Arizona 85280
(602) 350-8227

Thomas J. Berning
City Attorney
Stephen L. Wetherell
Senior Assistant City Attorney
City of Tucson
255 West Alameda, 7th Floor
Tucson, Arizona 85701
(520) 791-4221

QUESTION PRESENTED

Whether courts must apply the plain language that Congress used in Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), allowing "any other person" to recover from other liable parties the necessary costs expended in cleaning up sites contaminated by hazardous substances, or whether courts may read into the statute the additional requirement that only "any innocent person" – that is, one who is not liable for any of the contamination – may proceed under Section 107(a) to recover such costs?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTERESTS OF THE AMICI CURIAE 1

REASONS FOR GRANTING THE PETITION 4

I. CERCLA's Plain Language, Structure, and Policy Support a Working PRP's Use of Section 107(a) ... 5

A. The Plain Language of CERCLA 5

B. CERCLA's Structure and Policies 10

II. The Ninth Circuit Decided an Important Federal Question in Conflict with This Court's Opinion in *Key Tronic v. United States* 16

CONCLUSION 18

TABLE OF AUTHORITIES

Page

CASES:

3550 Stevens Creek Assocs. v. Barclays Bank of Calif., 915 F.2d 1355 (9th Cir. 1990), *cert. denied*, 500 U.S. 917 (1991) 6

Akzo Coatings, Inc. v. Aigner Corp., 30 F.3d 761 (7th Cir. 1994) 12

Arizona v. Motorola, Inc., 139 F.R.D. 141 (D. Ariz. 1991) 12

Arizona v. Nucor Corp., 825 F. Supp. 1452 (D. Ariz. 1992), *aff'd*, 66 F.3d 213 (9th Cir. 1995) 10

Bethlehem Iron Works, Inc. v. Lewis Indus., Inc., 891 F. Supp. 221 (E.D. Pa. 1995) 8

Burlington Northern R.R. Co. v. Time Oil Co., 738 F. Supp. 1339 (W.D. Wash. 1990) 9

Cadillac Fairview/California, Inc. v. Dow Chemical Co., 840 F.2d 691 (9th Cir. 1988) 5

Colorado v. Idarado Mining Co., 916 F.2d 1486 (10th Cir. 1990), *cert. denied*, 499 U.S. 960 (1991) 2

General Electric Co. v. Litton Indus. Automation Sys., Inc., 920 F.2d 1415 (8th Cir. 1990), *cert. denied*, 499 U.S. 937 (1991) 7

Idylwoods Assocs. v. Mader Capital, Inc., 915 F. Supp. 1290 (W.D.N.Y. 1996) 6

In re Pacific-Atlantic Trading Co., 64 F.3d 1292 (9th Cir. 1995) 8

TABLE OF AUTHORITIES – Continued

Page

Key Tronic Corp. v. United States, 511 U.S. 809 (1994) 4, 5, 6, 14, 16, 17

Levin Metals Corp. v. Parr-Richmond Terminal Co., 799 F.2d 1312 (9th Cir. 1986) 6, 15

Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837 (4th Cir.), *cert. denied*, 506 U.S. 940 (1992) 13

Price v. U.S. Navy, 39 F.3d 1011 (9th Cir. 1994) 13

Securities and Exchange Comm'n v. United Benefit Life Ins. Co., 387 U.S. 202 (1967) 5

Standard Oil Co. v. Federal Trade Comm'n, 340 U.S. 231 (1951) 5

The Pinal Creek Group v. Newmont Mining Corp., et al., 926 F. Supp. 1400 (D. Ariz. 1996), *rev'd*, 118 F.3d 1298 (9th Cir. 1997) 11, 12, 14, 15

United States v. Cannons Eng'g Corp., 899 F.2d 79 (1st Cir. 1990) 10, 16

United States v. Pretty Products, Inc., 780 F. Supp. 1488 (S.D. Ohio 1991) 16

United States v. South Carolina Recycling and Disposal, Inc., 653 F. Supp. 984 (D.S.C. 1984) 9

United States v. Turkette, 452 U.S. 576 (1981) 8

Wehner v. Syntex Agribusiness, Inc., 616 F. Supp. 27 (E.D. Mo. 1985) 9

STATUTES

42 U.S.C. § 9601 1

42 U.S.C. § 9601(35) 7

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C. § 9606(a) 2

42 U.S.C. § 9607 16

42 U.S.C. § 9607(a) 4, 6, 15

42 U.S.C. § 9607(a)(4)(A) 6

42 U.S.C. § 9607(a)(4)(B) 6

42 U.S.C. § 9607(b)(1)-(3) 12

42 U.S.C. § 9607(b)(3) 7

42 U.S.C. § 9607(e)(2) 9

42 U.S.C. § 9611 2

42 U.S.C. § 9613 16

42 U.S.C. § 9613(f) 4

42 U.S.C. § 9613(f)(2) 10

42 U.S.C. § 9613(f)(3)(B) 10

Superfund Amendments and Reauthorization Act ("SARA"), Pub. L. 99-499, 100 Stat. 1613 (1986) 6

REGULATIONS

40 C.F.R. Part 300 6

40 C.F.R. Part 300, Appendix B 2

40 C.F.R. § 300.425(b)(1) 2

OTHER

"National Priorities List for Uncontrolled Hazardous Waste Sites," 62 Fed. Reg. 50442 (Sept. 25, 1997) 2

TABLE OF AUTHORITIES – Continued

Page

H. Rep. No. 1016, 96th Cong., 2d Sess. (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119 9

Milton Russell, et al., "Hazardous Waste Remediation: The Task Ahead," (Univ. of Tenn. 1991)..... 2

National Research Council, *Alternatives for Ground Water Cleanup* (Nat'l Acad. Press. 1994) 2

Office of Technology Assessment, "State of the State on Brownfields: Programs For Cleanup and Reuse of Contaminated Sites," OTA-BP-ETI-153 (June 1995)..... 2

Restatement (Second) of Torts Section 886A(1)..... 15

U.S. EPA, "Setting the Record Straight" (Office of Solid Waste and Emergency Response, April 3, 1995)..... 1

INTERESTS OF THE AMICI CURIAE

The States of Alabama, Arizona, Arkansas, Georgia, Missouri, Ohio, Oklahoma, Tennessee, Vermont, Virginia, West Virginia, the Cities of Phoenix, Scottsdale, Tempe and Tucson, Arizona, the City of Cincinnati, Ohio, the City of Fresno, California, and the City of Seattle, Washington (collectively, the "States and Cities") share substantial interests in the cleaning up of the environment and, hence, preserving the nation's ability to remediate sites contaminated by hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq.* (commonly known as Superfund). While most States have adopted parallel statutes, CERCLA's strict, joint, several and retroactive liability scheme typically makes it the favored vehicle for governments and private parties seeking to obtain funds for cleanup from those responsible. The amici represent the public interest in remediating the overwhelming number of contaminated sites, many polluted years or decades ago by numerous parties. Given the limited public enforcement resources available to address them, the plain language of the Superfund law must not be disregarded in favor of an interpretation that discourages liable private parties from undertaking remedial action. The decision of the United States Court of Appeals for the Ninth Circuit at issue does precisely that.

The legacy of past hazardous waste disposal practices has left the nation with some 40,000 sites actively being addressed by the United States Environmental Protection Agency ("U.S. EPA"), the States, and municipal governments. *See* U.S. EPA, "Setting the Record Straight" (Office of Solid Waste and Emergency Response, April 3,

1995). Beyond that, there may be as many as 400,000 additional contaminated sites, meaning that government enforcement cannot be awaited at all of them. *See* Office of Technology Assessment, "State of the State on Brownfields: Programs for Cleanup and Reuse of Contaminated Sites," OTA-BP-ETI-153 (June 1995), p. 2 (contaminated sites in United States may number 450,000); *see also* National Research Council, *Alternatives for Ground Water Cleanup* 27 (Nat'l Acad. Press. 1994) (number of sites where ground water may be contaminated ranges between 300,000 to 400,000). U.S. EPA generally takes enforcement action only with respect to the 1,204 sites on the agency's National Priorities List. *See* "National Priorities List for Uncontrolled Hazardous Waste Sites," 62 Fed. Reg. 50442 (Sept. 25, 1997) (to be codified at 40 C.F.R. Part 300, Appendix B); 40 C.F.R. § 300.425(b)(1). That leaves the bulk of the cleanup task for the States and municipalities, including the amici, and willing private parties. States and cities, unlike the federal government, must do so without the benefit of the federal Hazardous Substance Trust Fund (the "Superfund" which U.S. EPA uses as a revolving enforcement fund) and without the ability to unilaterally order private parties to conduct CERCLA cleanups. *See* 42 U.S.C. §§ 9611 (establishing tax on petroleum and certain feedstock chemicals) and 9606(a) (allowing U.S. EPA to issue unilateral cleanup orders not subject to pre-enforcement review); *Colorado v. Idarado Mining Co.*, 916 F.2d 1486, 1494 (10th Cir. 1990) (injunctive relief under Section 106 is not available to States), *cert. denied*, 499 U.S. 960 (1991). *See also* Milton Russell, et al., "Hazardous Waste Remediation: The Task Ahead," (Univ. of Tenn. 1991) (over next 30 years, nation likely will

spend $480 billion to $1 trillion, with "best guess" of $750 billion, to clean up ground water contamination). Fiscal realities accordingly force the States and Cities to rely upon private parties to conduct the majority of the cleanup of these sites. Usually, potentially responsible parties ("PRPs") conduct cleanup at a site and then seek to recover the necessary costs incurred from other PRPs who did not perform any cleanup in a CERCLA action. Therefore, ensuring that CERCLA provides incentives to a liable but working party to conduct cleanups is of vital importance to the States and Cities.

The Ninth Circuit's decision limits PRPs to pursuing contribution actions under CERCLA Section 113, thus frustrating one of CERCLA's overarching goals – promoting prompt voluntary cleanups by private parties. Absent the distinct advantages afforded by cost recovery actions under Section 107(a), such as strict, joint and several liability, a shifted burden of proof as to liability allocation, and a longer statute of limitations, PRPs will have no incentive to come forward, settle their liability, and undertake costly remedial activities. This is of grave concern to the States and Cities.

The States and Cities also have an interest in ensuring that CERCLA is enforced uniformly across the nation. The current judicial conflict regarding whether a PRP may proceed under Section 107(a) renders the law unstable and unpredictable. This split of authority and the unpredictability it fosters makes it unlikely that PRPs will initiate cleanups voluntarily and, additionally, could lead PRPs that have begun cleanups to stop their work.

REASONS FOR GRANTING THE PETITION

The Pinal Creek Group's Petition seeks resolution of the conflict in the federal courts regarding the nature of the cost recovery claim that liable parties who conduct remediation ("Working PRPs") may bring under CERCLA. Some courts allow liable parties who perform cleanup work to seek cost recovery from other PRPs pursuant to Section 107(a), 42 U.S.C. § 9607(a), for those out-of-pocket response costs. Other courts limit PRPs to seeking contribution pursuant to Section 113(f), 42 U.S.C. § 9613(f), just like those who have been ordered to reimburse another party that has directly incurred cleanup costs. This split of authority and the unpredictability of what will happen when millions of dollars have been spent by Working PRPs in reliance on the federal statute make it unlikely that PRPs will initiate cleanups voluntarily. Additionally, Working PRPs that have started cleanup work at a site might choose to stop these cleanup efforts in light of the uncertainty of the law.

The plain language and structure of CERCLA, coupled with the statute's policies encouraging early settlements and voluntary cleanups by private parties, compel a determination that PRPs who incur response costs – that is, expend resources conducting the actual cleanup activities – should be allowed to seek recovery of those costs under Section 107(a). In point of fact, this Court's decision in *Key Tronic Corp. v. United States*, 511 U.S. 809 (1994), while not explicitly addressing this issue, applied the plain language of Section 107(a) and permitted a Working PRP to assert a cost recovery claim for its necessary costs of response. The Ninth Circuit, however, disregarded CERCLA's plain language and the clear

implications of the *Key Tronic* decision by imposing unnecessary and counterproductive constraints on Working PRPs. Unless this Court makes clear that Working PRPs may pursue cost recovery under Section 107(a), the Superfund program will be crippled by the loss of significant incentives to voluntary remediation, leaving the States and Cities with an insurmountable cleanup burden. The singular importance of this issue to the future of this nation's ability to address the tens of thousands of sites contaminated by hazardous substances, and the need to clarify the *Key Tronic* decision to meet that challenge, merit granting the Petition for a Writ of Certiorari. *Cf. Securities and Exchange Comm'n v. United Benefit Life Ins. Co.*, 387 U.S. 202, 207 (1967) (certiorari granted to address important issue and to clarify prior decision); *Standard Oil Co. v. Federal Trade Comm'n*, 340 U.S. 231, 234 (1951) (certiorari granted to decide important statutory issue not settled by this Court).

I. CERCLA's Plain Language, Structure, and Policy Support a Working PRP's Use of Section 107(a).

A. The Plain Language of CERCLA.

Previously, the Ninth Circuit has properly noted that a court should follow the plain language of Section 107 rather than adopt "an interpretation of CERCLA that would create a significant obstacle to private response actions not contemplated by Congress." *Cadillac Fairview/California, Inc. v. Dow Chemical Co.*, 840 F.2d 691, 695 (9th Cir. 1988). Inexplicably, the Ninth Circuit failed to heed its own instruction in the ruling below.

It is well-established that CERCLA Section 107(a) generally imposes strict, joint, and several liability upon four classes of responsible parties. 42 U.S.C. § 9607(a); *3550 Stevens Creek Assocs. v. Barclays Bank of Calif.*, 915 F.2d 1355, 1357 (9th Cir. 1990), *cert. denied*, 500 U.S. 917 (1991); *Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 799 F.2d 1312, 1316-17 (9th Cir. 1986). With respect to most governmental plaintiffs, this liability is for "all costs" of response "not inconsistent with the National Contingency Plan" (the CERCLA cleanup blueprint found at 40 C.F.R. Part 300). 42 U.S.C. § 9607(a)(4)(A). With respect to private parties and local governments, this liability is for "any other necessary costs of response incurred by *any other person* consistent with the National Contingency Plan," 42 U.S.C. § 9607(a)(4)(B) (emphasis added). This provision "unquestionably provides a cause of action for private parties to seek recovery of cleanup costs." *Key Tronic*, 511 U.S. at 818.

Nothing in Section 107(a)'s plain language precludes its use by liable parties who actually incur response costs. Indeed, it is the modifying phrase "costs of response incurred" that defines a private party's right to bring a cost recovery action. It is not, as has been argued, the imagined and judicially engrafted modifier "innocent," as in "any other [innocent] person," which determines private-party standing under Section 107(a). Congress could easily have limited the action to "innocent" persons, but it did not.[1] *Cf. Idylwoods Assocs. v. Mader Capital, Inc.*, 915

---

[1] Elsewhere in the statute, Congress did choose to distinguish between liable and "innocent" parties. Section 101(f) of the Superfund Amendments and Reauthorization Act

F. Supp. 1290, 1313 (W.D.N.Y. 1996) ("If, when Congress recognized contribution as an available remedy in CERCLA actions, it wished to require a PRP to utilize only § 113 in seeking reimbursement of response costs, it could easily have said so.").

A review of the other provisions of Section 107 also precludes courts from inserting the term "innocent" into Section 107(a)(4)(B). Neither subsection (a)(4)(A) (which creates federal, state and tribal governmental standing) nor subsection (b) (which enumerates the defenses to subsection (a) liability), makes any distinction between innocent and non-innocent plaintiffs. In fact, with respect to defenses, courts have consistently rejected those alleging a plaintiff's liability status as being beyond the scope of the enumerated defenses in Section 107(b). *E.g., General Electric Co. v. Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415, 1418 (8th Cir. 1990) ("CERCLA does not provide for an 'unclean hands' defense"), *cert. denied*, 499 U.S. 937 (1991). The only distinction drawn between private parties in Section 107(a) is between those who have incurred response costs and those who have not.

Moreover, nothing in the plain language of Section 113 prohibits Working PRPs that have incurred response costs from asserting claims under Section 107(a). For

---

("SARA"), Pub.L. 99-499, 100 Stat. 1613, codified at 42 U.S.C. § 9601(35), introduced the "innocent landowner" defense to CERCLA liability. This provision operates in concert with CERCLA Section 107(b)(3), 42 U.S.C. § 9607(b)(3), one of the enumerated defenses to Section 107(a) liability. Congress' particularized focus on the "innocence" of certain landowner parties indicates that it was aware of the distinction and did not intend it to be imported into the other provisions of Section 107.

example, nowhere in the text of Section 113(f) did Congress express any intention that contribution actions would be the exclusive reimbursement remedy for PRPs. *See, e.g., Bethlehem Iron Works, Inc. v. Lewis Indus., Inc.*, 891 F. Supp. 221, 225 (E.D. Pa. 1995).

Additionally, Section 113(g), which sets forth the differing statutes of limitations applicable to Sections 107(a) and 113(f), actually favors an interpretation of the statute permitting Working PRPs to bring cost recovery actions. The three-year limitations period for contribution actions runs from the date of a judgment, an administrative order, or entry of a judicially-approved settlement concerning costs or damages. *See* Section 113(g)(3). Conversely, the six-year limitations period for cost recovery under Section 107(a) begins after "initiation of physical on-site construction of the remedial action." *See* Section 113(g)(2). Limiting PRPs who *voluntarily* initiate and carry out cleanups to contribution actions under Section 113(f) would create the truly odd situation where there is no applicable statute of limitations, a result Congress could not logically have intended. *See, e.g., United States v. Turkette*, 452 U.S. 576, 580 (1981) (in interpreting statutes, "absurd results are to be avoided"); *In re Pacific-Atlantic Trading Co.*, 64 F.3d 1292, 1303 (9th Cir. 1995) (courts do not presume Congress intended statute to have an absurd result). Only by interpreting CERCLA to allow Working PRPs to bring cost recovery actions under Section 107(a), subject to the six-year statute of limitations under Section 113(g)(2), can one avoid this absurd outcome, while giving meaning to the statute's express terms.

CERCLA's legislative history also supports the view that Congress did not intend to prohibit PRPs from using Section 107(a). In adopting the section, Congress stated that, among other objectives, the 1980 CERCLA provisions "would also establish a federal cause of action in strict liability . . . to induce such persons voluntarily to pursue appropriate environmental response actions with respect to inactive hazardous waste sites." H. Rep. No. 1016, 96th Cong., 2d Sess., at 17 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6120. Prior to the enactment of SARA, the right of action given to working parties under Section 107 was clear enough. Less certain then was whether contribution was available to non-working parties who litigated and lost claims brought by others who had conducted cleanup. *Burlington Northern R.R. Co. v. Time Oil Co.*, 738 F. Supp. 1339, 1341 (W.D. Wash. 1990). In these circumstances, of course, payments made to satisfy judgments or otherwise resolve liability did not appear to constitute direct incurrence of response costs within the meaning of Section 107(a)(4)(B). To ameliorate any harsh consequences that might result, most pre-SARA courts found that non-working defendants in a cost recovery action nonetheless could obtain contribution, because such a right was implied in the legislative history of CERCLA and in CERCLA Section 107(e)(2), which preserves causes of action available "by subrogation or otherwise." 42 U.S.C. § 9607(e)(2). *See, e.g., Wehner v. Syntex Agribusiness, Inc.*, 616 F. Supp. 27, 31 (E.D. Mo. 1985) (cross-claim for contribution for any amounts found to be due to plaintiff is implicitly recognized in Section 107(e)(2) and the legislative history of CERCLA); *United States v. South Carolina Recycling and Disposal, Inc.*, 653 F.

Supp. 984, 995 (D.S.C. 1984) (right of contribution implied from common law principles and Section 107(e)(2)).

Congress attempted to remedy this confusion in SARA by, among other things, adding an express right of contribution for liable parties – Section 113(f)(2). That Section provides that a "person who has resolved its liability to the United States . . . *may* seek contribution" from non-settling PRPs. 42 U.S.C. § 9613(f)(3)(B) (emphasis added). Section 113(f) of SARA thus clarified the right to contribution of PRPs who had not themselves incurred response costs, but who had paid the government or another party for response costs incurred. In short, Section 113 was added to provide a modest remedy for the recalcitrant. However, nowhere in Section 113 did Congress ever express an intent to make Section 113(f) the exclusive reimbursement remedy for Working PRPs.

B. CERCLA's Structure and Policies.

Even if the plain language did not so clearly allow a Working PRP to employ Section 107, any interpretation of CERCLA limiting Working PRPs to contribution actions under Section 113(f) would violate the framework of the statute and its underlying policies, which encourage settlements and create incentives for voluntary cleanups by threatening non-working parties with disproportionate liability. *See, e.g.*, 42 U.S.C. § 9613(f)(2); *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 91 (1st Cir. 1990) ("Congress explicitly created a statutory framework that left non-settlors at risk of bearing a disproportionate amount of liability"); *Arizona v. Nucor Corp.*, 825 F. Supp. 1452, 1463 (D. Ariz. 1992) (adopting *Cannons*), *aff'd*, 66 F.3d 213

(9th Cir. 1995). Precluding working parties from employing Section 107(a) would get it precisely backwards, by threatening *settlors* with disproportionate liability and creating an incentive to be the last holdout. As the District Court below correctly noted, loss of the threat of joint and several liability and other statutory incentives under Section 107(a) would be "at war with CERCLA policy, because Plaintiffs would be less likely to voluntarily perform a lengthy and costly cleanup if the prospect of recovering their costs is remote and expensive." *The Pinal Creek Group v. Newmont Mining Corp., et al.*, 926 F. Supp. 1400, 1408 (D. Ariz. 1996) (Petition at App. 40), *rev'd*, 118 F.3d 1298 (9th Cir. 1997).

The District Court's ruling eloquently described the CERCLA policies that support allowing a Working PRP to proceed under Section 107(a). *See* Petition at App. 38-40. "Courts have characterized CERCLA's goals as two-fold: encouraging the prompt and voluntary cleanup of hazardous wastes; and imposing the costs of cleanup on responsible parties." *Id.* at App. 38. Allowing Working PRPs to proceed against recalcitrant PRPs under Section 107(a) encourages these twin goals by creating several incentives. As Judge Silver explained:

> These incentives include: (1) shifting the difficult burden of proof concerning the allocation of cleanup costs from plaintiffs to defendants; (2) relieving plaintiffs of the risk of being held liable for "orphan shares" – cleanup costs that would otherwise be charged to insolvent or absent parties; (3) minimizing plaintiffs' transaction costs involved in tracking down and suing every PRP; (4) limiting the range of available defenses to those enumerated in Section

> 107(b);[2] and (5) giving parties who initiate cleanups the benefit of a longer statute of limitations.

Id. at App. 39. If working PRPs are limited to a contribution action under Section 113, the Working PRPs

> would bear the burden of proving that they had assumed more than their fair share of cleanup costs[,] . . . might have to track down and sue every [recalcitrant PRP], incurring considerable transaction costs[,] . . . risk being stuck with cleanup cost shares attributable to absent or insolvent parties[,] . . . [and] would not be able to wield the threat of disproportionate liablity against Defendants to encourage early settlement.

Id. at App. 40. In short, if Working PRPs were limited to a contribution action under Section 113, the "foregoing incentive scheme would be turned on its head." *Id.*

Private parties who come forward, enter settlements,[3] conduct cleanups, and then seek to recover their

---

[2] These statutory defenses are that the release or threat of a release of hazardous substances from a facility was caused solely by: (1) an act of God; (2) an act of war; or (3) an act or omission of a third party, other than an employee or agent of the defendant or one whose act or omission occurs in connection with a contractual relationship with the defendant. 42 U.S.C. § 9607(b)(1)-(3).

[3] Many voluntary CERCLA settlements are ultimately embodied in a consent decree for administrative purposes. Typically, this involves concurrently filing a complaint against a settling party and a consent decree resolving all claims in the complaint. *See, e.g., Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 763 (7th Cir. 1994); *Arizona v. Motorola, Inc.*, 139 F.R.D. 141,

costs from recalcitrant PRPs must be rewarded for their willingness to undertake and fund remedial actions. By no means should they suffer greater exposure and higher risk than PRPs that do nothing and wait to be sued. *Cf. Price v. U.S. Navy*, 39 F.3d 1011, 1015 (9th Cir. 1994) ("CERCLA was enacted to facilitate the cleanup of environmental contamination by hazardous waste releases. . . . CERCLA employs several mechanisms to further this purpose. One of those mechanisms is a private action for recovery of response costs"); *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 841 (4th Cir.) (purpose of private cost recovery under Section 107(a) is to encourage private cleanup), *cert. denied*, 506 U.S. 940 (1992).

The Ninth Circuit's decision to deprive Working PRPs of these advantages is wrong, unfair, and contrary to public policy. A Working PRP that initiates and conducts a cleanup must be allowed to seek recovery of its "necessary costs of response" under Section 107(a). Concurrently, it should be able to assert a separate action under Section 113(f) with respect to payments it made to third parties to resolve liability for response costs incurred by others, including the government. Nonworking PRPs can, should, and *do* assert contribution counterclaims to ensure that the Working PRP does not avoid paying its equitable share of the cleanup costs. In other words, Working PRPs are entitled to use Sections

---

143 (D. Ariz. 1991). Whether a PRP can proceed under Section 107 obviously should not be contingent upon whether it has engaged in this largely mechanical process, but rather on whether it has actually spent money on response activities.

107 and 113; non-working parties then may invoke Section 113. As Judge Silver explained in her opinion below, this "two-step framework" creates significant incentives for PRPs to voluntarily conduct cleanups, while ensuring that all responsible parties bear their fair share of the costs. *See The Pinal Creek Group*, 926 F. Supp. at 1407 (Petition at App. 38-39). Among other things, this process properly places the burden of proving equity on the party that has *refused* to spend its own money to remediate environmental harms that it, at least in part, is responsible for causing. As previously noted, this Court's opinion in *Key Tronic* confirms the correctness of this analysis. *See* 511 U.S. at 820-21 (noting that Key Tronic had asserted a claim under Section 107(a) to recover certain response costs incurred in searching for other PRPs and asserted a contribution claim under Section 113 to recover a portion of money repaid to the government).

The Ninth Circuit's decision limiting Working PRPs to assert only contribution actions embraces two ill-founded and overlapping assumptions: first, that all PRPs, whether working or recalcitrant, stand on equal legal footing within the context of CERCLA; and second, based on that assumed legal parity, that any causes of action between PRPs are, by definition, contribution actions. The former assumption disregards the clear distinction in Section 107(a)(4)(B) between working and non-working parties (i.e., between those who incur "necessary costs of response" and those who, at some later date, merely reimburse another for an equitable share of the cleanup cost). The latter assumption compounds the error by erroneously interpreting the Section 113(f) cause of action as one between joint tortfeasors subject to the

common-law rules of contribution expressed in the Restatement (Second) of Torts Section 886A(1). Such a misinterpretation fails to recognize that, in enacting Section 113 in 1986 as part of SARA Congress intended merely to "clarify and confirm" the pre-SARA case law which "recognized the right of culpable private parties to obtain *indemnification* and/or contribution from recalcitrant parties for remediation costs." *The Pinal Creek Group*, 926 F. Supp. at 1410 (Petition at App. 45) (emphasis in original).

The Ninth Circuit's decision likewise is premised upon the assumption that Congress set out to create the Section 107(a) cause of action for a small universe of parties – those who fell outside CERCLA's broad liability scheme, but who nevertheless undertake cleanup – rather than the significantly larger universe of liable but working parties. Given a statutory scheme that enumerates three exclusive defenses – two of which have never succeeded on the merits in a reported decision – that is a quixotic assumption indeed.[4]

Similarly unfounded is the concern that allowing PRPs to assert claims under Section 107(a) would permit an "end-run" around the contribution protection (immunity from civil claims) afforded by Section 113(f)(2).

---

[4] Liability to the government for persons who fall under CERCLA Section 107(a) generally is subject only to the enumerated defenses of Section 107(b). *See* 42 U.S.C. § 9607(a) (liability is "notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b)"); *Levin Metals*, 799 F.2d at 1316-17. Neither the "act of God" nor the "act of war" defense has succeeded on the merits.

Under Section 113(f)(2), contribution protection applies to "matters addressed" by a settlement agreement and is unaffected by the label a plaintiff attaches to its claim against a settling party. The States and Cities are confident in the ability of the courts to recognize and prevent attempts to "end-run" CERCLA's contribution protection provisions. *See, e.g., Cannons Eng'g*, 899 F.2d at 92-93 (no equitable indemnity claim may be asserted against a party to a judicially approved CERCLA settlement); *United States v. Pretty Products, Inc.*, 780 F. Supp. 1488, 1495-97 (S.D. Ohio 1991) (indemnity claim prohibited as disguised contribution claim).

II. The Ninth Circuit Decided an Important Federal Question in Conflict with This Court's Opinion in *Key Tronic v. United States*.

Permitting Working PRPs to assert cost recovery actions under Section 107(a) is also in keeping with and further bolstered by this Court's opinion in *Key Tronic Corporation v. United States*, 511 U.S. 809 (1994). Key Tronic Corporation was a PRP that incurred $1.2 million in response costs (in the form of attorney's fees) of its own and also made a $4.2 million payment to the government in settlement of an enforcement proceeding. *Id.* at 812. Thereafter, Key Tronic brought a Section 107 claim to recover its $1.2 million out-of-pocket response costs *and* a Section 113 claim for contribution. 42 U.S.C. §§ 9607 and 9613. While noting that Key Tronic was "responsible for contaminating a landfill" and had entered into a prior consent decree, *id.* at 811, this Court nevertheless endorsed Key Tronic's use of Section 107(a) to recover certain of its out-of-pocket response costs incurred in

searching for other liable parties. *Id.* at 820-21. (Some of the fees were judged to be outside the scope of "necessary" costs of response.) The Court also noted that Key Tronic was limited to proceeding under Section 113 to the extent it had sought contribution to recover part of its monetary payment to the government. *Id.* at 812. In short, Key Tronic proceeded, with this Court's endorsement, as follows: under Section 107 with respect to its out-of-pocket "necessary costs of response," and under Section 113 with respect to its payment to resolve liability for others' response costs. This dual approach by Key Tronic is precisely what Congress intended should occur, what the plain-language of CERCLA provides, and what the District Court below decided.

In *Key Tronic*, this Court clearly decided that a PRP plaintiff could recover its response costs under "§ 107, which impliedly authorizes private parties to recover cleanup costs from other PRP's." *Id.* at 818. The Court also rejected the contention that SARA's 1986 addition of an express right of contribution preempted the right of action under Section 107 created in 1980:

> [T]he statute now expressly authorizes a cause of action for contribution in § 113 and impliedly authorizes a *similar and somewhat overlapping* remedy in § 107.

Id. at 816 (emphasis added). The dissenting opinion in *Key Tronic* also agreed that Section 107(a) authorized recovery, taking issue only with the majority's characterization of a PRP's right as "implied" rather than express. *Id.* at 822.

Unfortunately, the Ninth Circuit ignored the clear implications of the *Key Tronic* decision and adopted an interpretation of CERCLA that violates its plain language, discourages voluntary cleanups by responsible parties, and puts the public at risk of further environmental degradation. By prohibiting Working PRPs from asserting a Section 107(a) cost recovery action against recalcitrant PRPs, the Ninth Circuit has undermined the intent of CERCLA, threatened the continued viability of the Superfund program, and jeopardized the public's ability to achieve a clean environment.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted this 12th day of January, 1998.

RODERICK G. MCDOUGALL
City Attorney
City of Phoenix, Arizona

PHILIP M. HAGGERTY*
Chief Assistant City Attorney
CRAIG J. REECE
Assistant City Attorney
200 West Washington Street,
13th Floor
Phoenix, Arizona 85003
(602) 262-6761
**Counsel of Record for Amici States and Cities*

Other Counsel Listed
Inside Front Cover